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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71–41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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VALLEY INSTANT PRINTING, INC., AURORA, ILLINOIS

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RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Pursuant to direction of the Court, the Respondent Flair Builders, Inc. responds hereby to the Petition for Writ of Certiorari filed herein by Petitioner International Union of Operating Engineers, Local 150, AFL-CIO.

QUESTION PRESENTED

Does the mere sometime existence of a collective bargaining agreement deprive a federal court of the power to make a threshold determination of whether the arbitration provisions and the agreement itself survived after prolonged laches and abandonment?

STATEMENT OF THE CASE

The Petitioner's Statement contains conclusions directly contrary to the findings of the trial court.

Union relations with the Company during the period 1964-1966 consisted *solely* of the first two-week period. In those two weeks, the Memorandum of Agreement was signed, the employee Rumsey joined the Union, and quit his employment with the Company (App. 86-87). Petitioner's allusion to repeated visits of the Union agent to the Company's construction site makes no mention of the Company ever having knowledge of such visits. Indeed it is undisputed that after the first two weeks, the Union had no contact with the Company during the entire period.

During the period 1967-1968, Petitioner claims two contacts between the Union agent and the Company--in the Spring of 1967 and again in the Spring of 1968. Petitioner's Statement fails to mention that the testimony regarding the first "visit" was impeached (App. 70, 96). Contrary testimony of the President of the Company, placing the first visit in 1968 (App. 90), was found to be the more credible by the District Court (App. 151).

The record below establishes a complete abandonment of any actual communications or other activity between the Union and the Company for a period in excess of four years. On this and other sufficient evidence, both the District Court (App. 149-

151) and the Court of Appeals (Appendix A to Petition for Certiorari) found the Petitioner guilty of laches in bar of judicial enforcement of the arbitration provisions of the Master Agreement.

REASONS FOR DENYING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS IS IN FULL CONFORMITY WITH DECISIONS OF THIS COURT.

The Petition for Writ of Certiorari, while supposedly relying on *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 11 L. Ed.2d 898, 84 S.Ct. 909 (1964), is in reality an attempt to override that decision. Petitioner seeks to extend one part of that decision at the expense of its basic premise. Petitioner would cause the abdication of primary judicial responsibility which *Wiley* found imposed on the federal court.

The *Wiley* decision clearly separated two areas of inquiry. The first area, referred to by Mr. Justice Harlan as "the threshold question," is an inquiry whether the arbitration provisions of a collective bargaining agreement *survives*, whether a party is bound to arbitrate, and if so, what issues it must arbitrate. This inquiry is for the court. A second area of inquiry, which the court leaves to arbitration, includes procedural questions growing out of the dispute. These questions *may* involve matters of timeliness as suggested by Petitioner. But only a gross misreading of *Wiley* could conclude that *all* matters involving timeliness are *ipso facto* procedural and arbitrable.

As stated by this Court in *Wiley*, at 376 U.S. at p.547:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all. * * * *
>
> ". . . So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claim known."

The quotation from *Wiley* appearing on pp. 12-13 of the petition for Writ of Certiorari, we must respectfully point out, is completely out of context. It did *not* refer to questions of delay in seeking arbitration (as Petitioner erroneously suggests), but rather to the omission of certain steps in the grievance procedure.

The decision below properly confined itself to the "threshold question." The District Court and the Court of Appeals found that a four-year abandonment by the Union, a five-year delay in seeking arbitration, and the resulting prejudice to the Company, amounted to laches which effectively barred the obligation to arbitrate.

We must acknowledge the policy priority given to arbitration by many decisions of this Court, as suggested in Petitioner's argument. Industrial peace, however, is not to be achieved by abdication of judicial function in labor law. The underlying assumption is that collective bargaining provides a mutual *quid pro quo*, a union giving up its right to strike in return for an employer's agreement to arbitrate labor disputes. It must be open to serious question whether this creditable policy has any application to such a labor history as indicated by the evidence below. Industrial peace under collective bargaining requires a healthy and active unionism. Petitioner's unionism and bargaining has consisted of five years of neglect and three years of litigation. Petitioner now asks that arbitration be made a weapon, not a tool for the settlement of bona fide labor disputes.

This Court's decision in *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 26 L.Ed.2d 199, 90 S.Ct. 1583 (1970), presents no conflict. Mr. Justice Brennan there specifically adopted the dissent in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 8 L.Ed.2d 440, 82 S.Ct. 1328 (1962), and held that when the District Court issues an anti-strike injunction it must first find that the contract does bind the parties to arbitration.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER COURTS OF APPEAL.

The decisions from the Second, Third, Fifth and Ninth Circuits cited by Petitioner are not in conflict with the decision below.

The question of "laches" referred to in *I. U. E.* v. *Westinghouse Electric Corporation*, 218 F.Supp.82 (S.D.N.Y. 1963), aff'd., 326 F.2d 758 (2d Cir. 1964), was a matter of delay in the prosecution of four specific grievance procedures (four out of twelve, all of which were the subject of constant negotiation between the parties). This was a matter of procedural delays, well outside the scope of the threshold question of whether any conditions existed such as might completely avoid the contractual obligation to arbitrate.

Similarly, *Local Lodge No. 595 of Dist. No. 152* v. *Howe Sound Co. (Inc.)*, 350 F.2d 508 (3rd Cir. 1965), presented a situation of continuing negotiations between the parties on the particular grievance (holiday and vacation pay), neither party having demanded arbitration until suit was filed six months after negotiations broke down. The Court treated the employer's motion to dismiss as a motion to stay the proceedings pending arbitration, holding the matter of "timeliness" as a matter properly to be decided by the arbitrator.

In *United Steelworkers of America* v. *American Int'l. Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), cert.denied, 379 U.S. 991 (1965), the employer resisted a Section 301 action to compel arbitration on the ground that a slowdown called by the Union had breached and therefore terminated the collective bargaining agreement. The *Court*, properly, made the determination that the slowdown had *not* had such effect, and that the matters of dispute were still arbitrable. It did not defer the threshold question of breach and release to the arbitrator.

In *Columbian Carbon Co.* v. *IUOE Local No. 405*, 360 F.2d 1018 (5th Cir. 1966), the employer resisted arbitration on the ground that the subject matter of the grievance was outside the scope of the arbitration clause in the contract. The *Court* found that there was no express exclusion of the type of matter from the broad arbitration clause of the contract, leaving the subject matter of the grievance (pay scales of transferred workers) for the arbitrator.

In *Local Union No. 490 United Rubber, C.L.&P. Workers* v. *Kirkhill Rubber Co.*, 367 F.2d 956 (9th Cir. 1966), the company resisted arbitration on the ground that the union had failed to follow the proper procedures in filing its grievance. Such matters being properly within the scope of the arbitrator under *Wiley*, the court ordered arbitration.

The seventh Circuit's own decision in *Local Union No. 51, IBEW* v. *Illinois Power Co.*, 357 F.2d 916 (7th Cir. 1966) is not in conflict. There, grievance procedure was not commenced until 9 months after the problem arose, and the contract called for invoking the procedure within 5 working days. The Court held that whether such failure "waived" the right to invoke the grievance procedure was properly a matter for the arbitrator, as a procedural dispute.

None of the foregoing cases reveals any conflict with the decision from which Petitioner seeks review by certiorari. In fact, the only similar case, from the Sixth Circuit, admittedly supports the decision below. *Amalgamated Clothing Workers* v. *Ironall Factories Co., Inc.* 386 F.2d 586 (6th Cir. 1967).

CONCLUSION

It is respectfully submitted that the Petition shows no special or important reason for granting the writ, that no court of appeals has rendered a decision in conflict with the decision of the court below, and that nothing calls for the exercise of this Honorable Court's power of supervision. Accordingly the Writ of Certiorari ought to be denied.

Respectfully submitted,

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Dated at Aurora, Illinois, October 15, 1971.

ADDENDUM

Respondent has received Petitioner's Supplement to the Petition for Writ of Certiorari, subsequent to preparing the body of Respondent's Response.

While it appears that Judge Craven's dictum in *Tobacco Workers International Union, Local 317* v. *Lorillard Corporation,* _____ F.2d _____ (4th Cir. 1971) is at odds with the decision of the Seventh Circuit in the matter at hand, it clearly appears that the facts and findings in *Tobacco Workers* are well within the area of procedural delays, intrinsic to the grievance procedure and the arbitration coverage. The Seventh Circuit would have reached the same decision on the same facts, applying the approach adopted by Judge Swygert in the matter at hand.

The *Tobacco Workers* accordingly presents no conflict between Circuits. The decision of the Seventh Circuit in *Halcon International, Inc.* v. *Monsanto Australia Limited,* 446 F.2d 156 (7th Cir. 1971) falls in the sphere of commercial arbitration, and is outside the scope of the Labor Management Relations Act policy. It presents no reason for this Court's intervention in the case at hand.

Respectfully submitted,

J. ROBERT MURPHY